

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

ALLERGEN, INC. and DUKE)	
UNIVERSITY,)	
)	
Plaintiffs,)	
)	CIVIL ACTION NO. 1:11-cv-650
)	
HI-TECH PHARMACAL CO., INC.,)	
)	
Defendant.)	

**MOTION TO CONSOLIDATE CASE NOS. 1:11-cv-650; 1:11-cv-298-CCE-WWD and
1:10-cv-681-CCE-WWD PURSUANT TO FED. R.CIV. P. 42(a)**

Defendant, by and through counsel, respectfully submits this Motion to Consolidate Case Nos. 1:11-cv-650; 1:11-cv-298-CCE-WWD and 1:10-cv-681-CCE-WWD pursuant to Fed. R.Civ.P. 42(a). In support of this motion, Defendant states as follows:

1. Plaintiffs instituted *Allergan, Inc. and Duke University v. Apotex, Inc. and Apotex Corp.*, Civil Action No. 1:10-CV-681-CCW-WWD (the “Apotex case”), in this Court on September 8, 2010, asserting claims against Apotex Inc. and Apotex Corp. (collectively “Apotex”) for infringement of U.S. Patent Nos. 7,351,404 (“the ‘404 patent”), 7,388,029 (“the 029 patent”), and 6,403,649 (“the 649 patent”) under U.S.C. § 271(e)(2) arising from Apotex’s Abbreviated New Drug Application (“ANDA”) No. 201894 seeking FDA approval for development, manufacture, and sale of a Bimatoprost Topical Solution, 0.03%, a generic version of Allergan’s hypotrichosis treatment, Latisse®, prior to expiration of the ‘404 and ‘029 patents based on claims of invalidity and noninfringement.

2. Plaintiffs instituted the similar case of *Allergan, Inc. and Duke University v. Sandoz, Inc.*, Civil Action No. 1:11-CV-298-CCE-WWD (the “Sandoz case”), in this Court on April 15, 2011. In the Sandoz case, Plaintiffs assert the same claims against Sandoz, Inc. (“Sandoz”) for

infringement of U.S. Patent Nos. 7,351,404 (“the ‘404 patent”), 7,388,029 (“the ‘029 patent”), the 6,403,649 (“the ‘649 patent”) under U.S.C. §271(e)(2) arising from Sandoz’s ANDA No. 202719 seeking FDA approval to engage in commercial manufacture, use and sale of Bimatoprost Topical Solution, 0.03%, a generic version of Latisse®, prior to expiration of ‘404 and ‘029 patents based on claims of invalidity and noninfringement.

3. The Apotex and Sandoz cases were consolidated by the Court on September 2, 2011, (the “Apotex/Sandoz case”).

4. Plaintiffs instituted a similar case of *Allergan, Inc. and Duke University vs. Hi-Tech Pharmacal Co., Inc.*, Civil Action No. 1:11-cv-650, (the “Hi-Tech case”) in this Court on August 17, 2011, asserting claims against Hi-Tech Pharmacal Co., Inc. (“Hi-Tech”) for infringement of U.S. Patents Nos. 7,351,404 (“the ‘404 patent”), 7,388,029 (“the ‘029 patent”), and 6,403,649 (“the ‘649 patent”) under U.S.C. §271(e)(2) arising from Hi-Tech’s Abbreviated New Drug Application (“ANDA”) No. 203051 seeking FDA approval for manufacture, use, importation, sale or offer for sale of Bimatoprost Topical Solution, 0.03%, a generic version of Allergan’s hypotrichosis treatment, Latisse®, prior to the expiration of the ‘404 and ‘029 patents based on claims of invalidity and noninfringement.

5. The Apotex/Sandoz case is assigned to District Court Catherine C. Eagles and Magistrate Judge P. Trevor Sharp. The Hi-Tech case is assigned to District Judge Catherine C. Eagles and Magistrate Judge L. Patrick Auld.

6. The Apotex/Sandoz case and Hi-Tech case involve common questions of law and fact relating to the claims of infringement and validity of the ‘404 patent, the ‘029 patent, and the ‘649 patent.

7. The parties to the Apotex/Sandoz case are currently under a Scheduling Order which provides for discovery to be completed by April 28, 2012. It is the understanding of Hi-Tech that no depositions have yet been conducted in the Apotex/Sandoz case as of this date.

8. The parties in the Hi-Tech case have already exchanged Initial Disclosures and are in the process of exchanging documents identified by agreement of counsel regarding the use of “search terms”, which are the same search terms utilized in the document productions in the Apotex/Sandoz case.

9. The parties in the Hi-Tech case have not yet filed Rule 26(f) Report(s) and the Rule 16 Conference is scheduled for January 19, 2012.

10. Hi-Tech will be requesting the following discovery deadlines which will only vary from the Apotex/Sandoz deadlines wherein indicated:

- (a) Close of Fact discovery 3/7/12 (8 weeks beyond the 1/7/12 Apotex/Sandoz deadline);
- (b) Close of General and Expert Discovery 4/28/12 (no change);
- (c) Opening expert reports for Defendant: 3/19/12 (7 weeks beyond the 1/28/12 Apotex/Sandoz deadline);
- (d) Rebuttal expert reports (both) 3/28/12 (4 weeks beyond the 2/28/12 Apotex/Sandoz deadline); and
- (e) Responsive expert reports (by both): 4/6/12 (2 weeks beyond the Apotex/Sandoz deadline).

Those deadlines only vary the deadlines in the current Scheduling Order in the Apotex/Sandoz case by a few weeks with the same deadline for the close of all discovery.

11. Hi-Tech has agreed to all other deadlines, which have not already passed, contained within the Scheduling Order entered in the Apotex/Sandoz case and, accordingly consolidation

of the Apotex/Sandoz case, and the Hi-Tech case, will not result in undue delay of either proceeding.

12. It is the understanding of Hi-Tech that the Apotex/Sandoz case is currently scheduled for trial beginning December 3, 2012. However, it is also the understanding of Hi-Tech that the trial date will likely be rescheduled. Hi-Tech agrees to be available and ready for trial at the Court's convenience at any time beginning November 1, 2012 or thereafter. Hi-Tech therefore requests that the trial date for the Apotex/Sandoz and Hi-Tech actions be set a date that will accommodate all counsel's existing calendars, and will be set by the Court upon conferring with the parties during the course of discovery.

13. Consolidation of the Apotex/Sandoz and Hi-Tech case will promote judicial economy and efficiency and will not prejudice any party.

14. Apotex and Sandoz have not consented to this Motion to Consolidate for reasons unrelated to any claim of anticipated delay or prejudice.

15. Allergan does not consent to this motion to consolidate. It is the understanding of counsel for Hi-Tech that Allergan does not consent due to conditions being requested by one or more of the defendants in the Apotex/Sandoz case.

WHEREFORE, based on the foregoing, and for reasons more particularly stated in the Memorandum in Support of Motion to Consolidate Defendant respectfully requests that this Court consolidate the Apotex/Sandoz case 1:10-cv-681-CCE-WWD and Hi-Tech case 1:11-cv-650-CCE-LPA, pursuant to Fed. R. Civ. P. 42(a), into a single proceeding following the schedule set forth in the Joint Rule 226(f) Report in the Apotex/Sandoz case with the minor modifications noted in paragraph number 10 above.

This the 14th day of December, 2011.

/s/ Lyn K. Broom

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served on October 7th, 2011, by operation of the Court's Electronic Case Filing System, on counsel of record in case number 1:11-CV-650, 1:10-CV-681, and 1:11-CV-298 as follows:

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This the 14th day of December, 2011.

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